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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 147.

JOSEFA RUIZ DE NOBLE, JAMES R. NOBLE, WILLIAM D. NOBLE, ET AL., APPELLANTS,

vs.

ELIZA GALLARDO Y SEARY, ESTEFANIA VARONNI, CELESTINA GALLARDO Y VARONNI, AND EVA GALLARDO Y VARONNI.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

FILED OCTOBER 12, 1909.

(21,864.)

(21,864.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 7, 1911.

1 THE UNITED STATES OF AMERICA,
District of Porto Rico, ss:

At a stated term of the District Court of the United States for Porto Rico, within and for the district aforesaid, begun and held at the court-rooms of said court, in the city of San Juan, on the second Monday of April, being the twelfth day of that month, in the year of our Lord one thousand nine hundred and nine, and of the independence of the United States of America the one hundred and thirty-third.

Present: The Hon. Bernard S. Rodey, Judge.

Among the proceedings had was the rendition of an Order of Dismissal in the following cause, to wit:

JOSEFA RUIZ DE NOBLE, JAMES R. NOBLE, WILLIAM D. NOBLE, SARA Isabel Noble de McCormack, Arthur H. Noble, Josefa B. Noble, and Maria T. Noble, Complainants,

vs.

ELIZA GALLARDO Y SEARY, ESTEFANÍA VARONI, CELESTINA GALLARDO Y VARONI, and EVA GALLARDO Y VARONI, Respondents.

Be it remembered that heretofore, to wit, on the ninth day of January, 1908, came the complainants by their solicitor and filed their Bill of Complaint in this cause, which said Bill is as follows, to wit:

To the Honorable Bernard S. Rodey, Judge of the United States District Court for Porto Rico, in Chancery Sitting:

Josefa Ruiz de Noble, James R. Noble, William D. Noble, Sara Isable Noble de McKormack, Arthur H. Noble, Josefa B.
2 Noble, and Maria T. Noble, who are all aliens and subjects of the King of England, bring this their bill of complaint against Eliza Gallardo y Seary, Estefanía Varoni, Celestina Gallardo y Varoni and Eva Gallardo y Varoni, defendants, who are citizens and residents of Porto Rico.

And thereupon your orators aforesaid complain and say: That during and prior to the year of our Lord 1865 one Ramon Ruiz Gandía, since deceased, was the owner of an undivided interest in a certain sugar estate or plantation in the jurisdiction of Loiza in the island of Porto Rico, called "San Jose Cacique," and was at the same time in possession and control of the whole of said plantation by virtue of a lease of the remaining interest therein from his co-owners, Doña Amalia Seary, Don Ricardo Gallardo and Don Jorge Seary, and so remained during the time of the continuance of the contract of refaccion hereinafter set forth.

Your orators further allege that on the 22nd day of December, A. D. 1865, the said Ramon Ruiz Gandia executed in favor of the

ancestor of your orators, William Noble, before the Public Scrivener, José Celestino Schroeder, a deed of acknowledgment of a mortgage lien, wherein it was stated and admitted that, as a result of an accounting had between said Ramon Ruiz Gandia and said William Noble, the former was indebted to said Noble in the sum of 16,186 escudos of the money then in circulation, which was the equivalent of $8,093 for the support and refaccion of said plantation from the year 1863 to that time, which said Ruiz was unable then to pay on account of the failure of the crops; that he thereby agreed to pay said indebtedness from the proceeds of the first crops made after the first of January of the following year, after deducting the proportion necessary for current expenses of the plantation; and that for the security of such payment said Ruiz in addition to the general lien upon all his property which the law then gave for such debts,
3 granted a special mortgage not only upon the products of the next crop but upon all following crops until said mortgage debt was wholly extinguished and stipulated that said deed should be recorded in the then Registry of Mortgages so that it might have all its legal effects as such a lien; all of which will more fully appear from a true and correct copy of said deed which is herewith filed marked "Exhibit A" and prayed to be taken as a part of this bill of complaint, together with a correct translation of the same into the English language.

Your orators further allege that the said provision contained in said deed providing for its registry in the then existing book of Mortgages was made in pursuance of the law then in force in Porto Rico to the effect that such indebtedness should be liquidated as to its amount by public document which might when so liquidated, be recorded and should thereupon become a lien upon the land therein described and against which it was so recorded; and that, in pursuance of said law, the said deed was so recorded in the old "anotaduría," in book 20, folio 7, No. 11.

Your orators further allege that said plantation "San Jose Cacique" at the time consisted of eight hundred and thirty-eight cuerdas of land within the barrio of the town of Loiza, having thereon two dwelling houses and various buildings composing a sugar factory, and was described at that time as bounded as follows: on the North, by the settlement called Las Cuevas and the farms of the Mediania belonging to various owners; on the South, by the lands of Ricardo Gallardo, of Pablo Ubarri and of Antonio Garcia Revolledo; on the East by the lands of Cecilio Lopez and of said Pablo Ubarri; and on the West by the Rio Grande de Loiza and other lands of the same Gallardo.

Your orators further allege that thereafter and about the
4 year 186- the said Ramón Ruiz Gandia, being unable to pay his debts, was declared a bankrupt; and that afterwards, upon a settlement of the bankrupt estate, the above mentioned Ricardo Gallardo, one of the co-owners, in said plantation with said Ruiz, acquired title thereto, but subject to various liens in favor of different persons and among them the lien of said William Noble as hereinbefore set forth; that thereafter said Gallardo obtained from

the proper Court a possessory title as owner of said plantation and, upon applying for the registry of said title in the year 1882, he was required to recognize as valid liens and agree to pay all such liens as appeared against said plantation upon the books of the old Registry, among which was the lien hereinbefore described; and that the validity and existence of said indebtedness and its lien upon said plantation was so recognized by said Gallardo, as appears duly noted in said Registry in Book 2 of Loiza, folio 2, estate No. 48, first inscription.

Your orators further allege that neither the principal sum of the indebtedness hereinbefore described, nor any part thereof, nor any interest thereon, was ever paid to said William Noble in his lifetime nor to anyone in representation of his heirs since his death, but that the whole amount thereof still remains due and unpaid and, with its interest, constitutes a mortgage lien upon the said plantation "San Jose Cacique" as above described; and that said Notarial Deed marked "Exhibit A" and containing the conclusive proof of the continued existence of said indebtedness and lien was duly presented in the present Registry on the 9th day of April, A. D. 1906, as appears from the indorsement of the Registrar thereon.

Your orators further represent that the said William Noble died, leaving a last will and testament under the provisions of which, and of the partition of inheritance made thereunder, your oratrix Josefa Ruiz de Noble, who is his widow, and the remaining complainants, who are his children, are jointly interested as his heirs as owners of the indebtedness hereinbefore described.

Your orators further represent that the said Ricardo Gallardo remained the owner of said plantation until his death, at which event he left two children, the defendant Eliza Gallardo y Seary and Felix Gallardo y Seary; that the latter has since died leaving as his heirs a widow, the defendant Estefania Varoni, and two children, the defendants Celestina and Eva Gallardo y Varoni; and that said defendants to this bill of complaint are now in possession and enjoyment of the plantation above named as heirs of the said Ricardo Gallardo, claiming to be the joint owners thereof.

Your orators further allege that in the year 1883 and during the lifetime of said Ricardo Gallardo the latter executed a further Notarial instrument wherein he recognized the validity and existence of the said indebtedness hereinbefore described and of the lien thereof upon said plantation; and that by said repeated recognition of the same the running of the statute of prescription has been interrupted, and therefore said indebtedness and the right of complainants to foreclose their lien therefor upon the plantation "San Jose Cacique" aforesaid is a valid and subsisting right, of which your orators may, and do hereby, avail themselves in this court of equity where matters of such character are peculiarly cognizable.

Forasmuch therefore, as your orators can have no adequate relief except in this court of equity, and to the end that the above named defendants may, if they can, show why your orators are not entitled to the relief hereby prayed, and may be required to make answer to this bill of complaint—but not under oath, the answer

under oath being hereby expressly waived; that the amount now due to your orators, as the heirs of said William Noble, for principal and interest upon the indebtedness set forth and determined in
6 said document marked "Exhibit A" may be fixed and decreed by, or under the authority of, this honorable court; that the amount, when so fixed, may be decreed to be a lien upon said plantation "San Jose Cacique" and foreclosed as such in this suit; that, in default of the payment to complainants of whatever amount may be so decreed to be due, within a short day to be fixed by the court, said plantation may be decreed to be sold at public auction to satisfy the same; that, in case of such sale, the defendants herein and all persons claiming through and under them since the commencement of this suit, and all other persons, though not parties to this suit, who have or claim any liens of any kind upon said described premises subsequent to the recording in the old registry of the lien under said contract, may be barred and foreclosed of all right of equity or redemption in said premises; and that your orators may have such other and further relief in the premises as equity may require and to your Honor may seem meet;

May it please your Honor to grant unto your orators a writ of subpœna in chancery, directed to the said Eliza Gallardo y Seary, Estefania Varoni, Celestina Gallardo y Varoni, and Eva Gallardo y Varoni, defendants herein, commanding them, on a day certain therein to be named and under a certain penalty therein to be expressed, to be and appear before this honorable court and then and there full, true, direct and perfect answer make to this bill of complaint, and stand to and abide by such orders and decree as the court may make in the premises.

And your orator will ever pray, etc.

(Signed) R. H. TODD,
N. B. K. PETTINGILL,
Solicitors for Complainants.

7 EXHIBIT "A" TO BILL OF COMPLAINT.

Translation.

Number One Hundred and Fifty-six.

In the town of Naguabo, Province of Porto Rico, on the 22nd day of December, 1865, before me, the undersigned public scrivener of this district and before the witnesses to be mentioned, there appeared Don Ramon Ruiz, a resident of Loiza, of whose acquaintance I hereby certify, and stated: that by a liquidation made on this date between himself and Mr. William Noble, a property owner of this district, it showed that the former owed the latter the sum of Sixteen Thousand one Hundred and Eighty-six Escusdos (8093 pesos) which he has been supplying him up to this date since the year 1863 to the present inclusive for the payment of the lease on the "San Jose Cacique" Estate, situated in the aforesaid town of Loiza, and by reason of not being able to grind the crop of this last year, for causes

not unknown to Mr. Noble, he has not been able to pay off said account; therefore, and wishing to carry into effect this agreement in the way and form more suitable in law, he states: That he acknowledges and confesses to be really and effectively the debtor of the above mentioned Mr. William Noble, in the above mentioned sum, for the reason given. And in as much as the delivery of the money is not made in my presence for the aforesaid reasons, the receipt thereof being true, he hereby renounces the exception of money not counted, of the new law, title one, fifth partida, which refers to same, and the two years granted by the same law to present said exception, which he hereby grants as if they had elapsed. He therefore binds himself to pay the above-mentioned sum to his creditor Noble, with the proceeds of the first crops which may be ground from next January thereafter at the said San Jose Cacique Plan-
8 tation; and there resulting from the liquidation made by the appearing party hereto, Ruiz, with Mr. Jose Rufino Goenaga in November last, that the former was indebted to said gentleman in the sum of two thousand Escudos (1,000 pesos), this must be paid during the month of October of next year 1866, thereby being cancelled that deed of refaccion, and Ruiz obliged not to execute any other agreement or deed with damage to this present one wherein there will be annulled and without effect whatever, that which he may execute in the future; this without prejudice of deducing also the ordinary and indispensable expense for the maintenance, and development required by the said Plantation by reason of the necessary refaccion and other expenses. For the better security of the aforesaid, besides the general obligation which he hereby makes of all his property hindering the special obligation, neither the special hindering the general, the appearing party hereto mortgages expressly and especially not only the canes which may be ground in the next crop by the "Cacique" Plantation, situated in the jurisdiction of Loiza as aforesaid, but also those which it may grind in the following crops until the complete payment of the amount herein acknowledged; allowing that the opportune annotation be taken of this instrument by the Registrar of Mortgages of this district, within the legal time of thirty days, of which obligation and its effects, I the Scrivener notified the parties hereto.

To the fulfilment of all that has been set forth in the present deed, the appearing party hereto affects his present and future property, with the clause which allows the courts to have same executed, executory contract, submission and renouncing all laws and rights in his favor, as well as that which prohibits the general law as to form.

It was thus stated by him and he signed same, being present witnesses and residents herein Don Roque Diaz, Don Joaquin Porrata and Don Ramon Muñoz, of all of which I hereby certify.

9 (Signed) RN. RUIZ GANDIA.

Scrolled:

JOSÉ CELESTINO SCHRODER,
Public Scrivener.

Mr. Antonio de Aldrey y Montolio, Notary of the Island of Porto Rico, General Keeper of the Records of Protocols of the District of Humacao, with domicile, residence and open office in this City, do hereby certify:

That the preceeding is a true and faithful copy of the original document which is to be found in the Protocol of this Notarial Office under my charge.

In witness thereof and at the request of Mr. William D. Noble, I issue the present copy to which I attach my mark, signature and scroll on two sheets of Notarial paper of my use, as well as a fifty cents stamp, as provided by the Hollander Bill, leaving an annotation as to the issuing of this copy, at Humacao, Porto Rico, August 4, 1905.

(Signed) ANTONIO DE ALDREY, *Notary.*

There is a 50¢ stamp and a seal.

Entered in the annotation letter A of property number 48, Page 4 turned of volume 2—of Loiza.

San Juan, Porto Rico, April 9, 1906.

[SEAL.] (Signed) The Registrar, JOSÈ BENEDICTO.

Plea to the Bill of Complaint.

(Filed March 3, 1908.)

Equity. No. —.

JOSEFA RUIZ DE NOBLE et al., Plaintiffs,
vs.
ELIZA GALLARDO Y SEARY et al.

The plea of Eliza Gallardo y Seary, Estefanía Varonni, Celestina Gallardo y Varonni, and Eva Gallardo y Varonni, defendants, to the Bill of Complaint of Josefa Ruiz de Noble et al., the above mentioned plaintiffs.

These defendants respectively, jointly and severally, by protestation, not confessing or acknowledging all or any of the said matters and things therein in the said plaintiffs' bill of complaint to be true in such manner and form as the same are therein set forth and alleged, for their plea to the whole of the said Bill, say:

That the cause of action herein, if any ever existed, which defendants deny, accrued in the year 1865; that plaintiffs and their ancestor the said William Noble, were, have been and are guilty of gross laches in the premises and that said cause of action, if any ever existed, which defendants deny, is a stale demand and has long since been and is now barred by law and especially by Articles — of the Mortgage law of —; Article 134 of the Mortgage Law of May 26th, 1893; and Articles 1864, 1865 and Clause 3 of Article 1867 of the Civil Code of Porto Rico of 1902 governing such cases.

That the plaintiffs ought not to have or maintain their suit herein for that if any cause of action ever existed against these defendants, or any of them, the same accrued more than thirty, twenty, and five years respectively prior to the time of the bringing of this suit, and this the defendants are ready to verify.

All of which matters and things these defendants do aver to be true, and they pray the judgment of this Honorable Court whether they shall be compelled to make any further answer to the said Bill and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

San Juan, Porto Rico, March 2, 1908.

JOSEPH ANDERSON,
Attorney for Defendants.

11 I, Estevania Vironni, being duly sworn, on my oath depose and say that I am one of the defendants in the above entitled and numbered case and that the allegations in the foregoing plea are true.

ESTEVANIA VIRONNI.

Subscribed and sworn to before me this the 2nd day of March, 1908.

[SEAL.] ANDRÉS B. CROSAS,
Notary Public.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

JOSEPH ANDERSON,
Attorney for Defendants.

Motion, Petition, and Bill of Intervention of Francisco de Goenaga et al.

(Filed April 7th, 1908.)

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

Foreclosure of Lien.

Come now Francisco Goenaga y Olsá, Ana de Goenaga y Olsá joined by her husband Augusto Chabert, Francisco Goenaga y Fuertes, Rufino Goenaga y Fuertes, Felix Padial y Goenaga, Maria Padial y Goenaga joined by her husband A. Salomon, Augusto Garcia de Quevedo y Goenaga, Nicolás Garcia de Quevedo y Goenaga, Rufino Garcia de Quevedo y Goenaga, Carlos Garcia de Quevedo y Goenaga, Obdulia des Cottes y Goenaga, and Victoria des Cottes y Goenaga joined by her husband Aureliano Ferrer, all residents of Porto Rico, by N. B. K. Pettingill and R. H. Tood, their solicitors,

and move the court for leave to file their petition in inter-
12 vention in the above entitled action, a copy of which said petition is hereto attached, marked "Exhibit A" and made a part of this motion.

And your intervenors hereby represent that their said petition of intervention refers to and affects the same tract of real estate or plantation, known by the name of San Jose De Cacique, of which this honorable court has acquired jurisdiction and control under the original bill filed in the above entitled cause and now pending in this court; and that the claim of your intervenors against said real estate is a lien of the same nature as that claimed by the complainants in the above entitled suit, but your intervenors hereby admit the priority in time and right of the lien claimed by said complainants and said petition and bill of intervention, as is shown by its allegations, only claims a lien right inferior and subject to whatever lien may be herein decreed in favor of the said complainants.

The foregoing motion will be based upon all the records, papers, pleadings and files in the above entitled action, and upon the said proposed petition and bill of intervention, which is hereto attached.

(Sig-ed) R. H. TODD,
N. B. K. PETTINGILL,
Solicitors for Proposed Intervenors.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

Foreclosure of Lien.

The petition for leave to intervene, and the bill of intervention therefor, of Francisco Goenaga y Olsá, Ana de Goenaga y Olsá joined by her husband Augusto Chabert, Francisco Goenaga y Fuertes, Rufino Goenaga y Fuertes, Felix Padial y Goenaga, Maria Padial y Goenaga joined by her husband A. Salomon, Augusto Garcia de Quevedo y Goenaga, Nicolás Garcia de Quevedo y Goenaga,
13 Rufino Garcia de Quevedo y Goenaga, Carlos Garcia de Quevedo y Goenaga, Obdulia des Cottes y Goenaga, and Victoria des Cottes y Goenaga joined by her husband Aureliano Ferrer, all residents of Porto Rico, exhibited against Eliza Gallardo y Seary, Estevania Varonni, Celestina Gallardo y Varonni and Eva Gallardo y Varonni, the defendants in the above entitled suit, who are also residents of Porto Rico.

The above named petitioners bring this their petition for leave to intervene herein, and present this as their bill of intervention, leave thereto being first had, and thereupon this petition shows:

To the Honorable Bernard S. Rodey, Judge of the United States District Court for Porto Rico:

Your intervenors aforesaid, by this their bill of intervention complain and say, that in the year 1862 and at all times after the 7th day of June thereof one Ramon Ruiz Gandia, since deceased, was the

owner of an undivided interest in a certain sugar estate in the jurisdiction of Loiza, in the island of Porto Rico, called San José de Cacique, and was at the same time in possession and control of the whole of said plantation by virtue of a lease of the remaining interest therein from his co-owners, Doña Amelia Seary, Don Ricardo Gallardo and Don Jorge Seary, and so remained during all the time of the continuance of the contract of refaccion hereinafter set forth.

Your intervenors further allege that on the 31st day of October of said year 1862 the said Ramon Ruiz Gandia entered into a contract of refaccion with the ancestor of your orators, Don Rufino de Goenaga, before the Public Scrivener Demetrio Gimenez y Moreno, whereby it was provided amongst other things that, as said Ruiz Gandia lacked funds to carry on the cultivation and development of said plantation, he contracted with said Goenaga to furnish the funds which might be necessary for that object for one year
14 from the first of November following, that is, from the first day of November, 1862, until the 31st day of October, 1863, the amount of money to be furnished each month being also specified therein, and agreed to give him in return the highest grade of security upon said plantation and the fruits thereof which the law at that time allowed under said contract of refaccion; all of which together with all other conditions of said contract will more fully appear from a true and correct copy thereof which is herewith filed marked "Exhibit A" and prayed to be taken as a part of this bill of complaint, and which is accompanied by a correct translation of the same into English.

Intervenors further allege that said contract of refaccion was renewed between the parties aforesaid for a further period from November 1863 to August 31st, 1865, and again from said last mentioned date until August, 1865; the last renewal aforesaid being by a Notarial document before the same Public Scrivener, Demetrio Gimenez y Moreno, under date of November 26, 1864; that said last described document also sets forth*er*, as required by the laws then in force, a liquidation of accounts resulting from the operations under said contract of refaccion up to the 30th day of September 1864, and thereby said Ramon Ruiz Gandia admitted his indebtedness to said Goenaga on that account to be six thousand and sixty three and 35/100 pesos ($6,063.35) of the foreign money then current among merchants, which your intervenors allege to have been gold; and that, because of such liquidation being required by law and of the lien which the same bore upon said plantation, it was expressly provided therein that said instrument, as to the sum so found to be due on said liquidation as aforesaid, should be forthwith recorded in the then existing "Book of Mortgages" of said municipality, and in pursuance thereof said instrument was so recorded on the 1st day
15 of December, 1864; all of which will more fully appear from the first Notarial copy of the same, with its certificate of such record, which is herewith filed marked "Exhibit B" and prayed to be taken as a part hereof, and which is accompanied by a correct translation of the same into English.

Intervenors further allege that said plantation San Jose de Cacique

at that time consisted of eight hundred and thirty eight cuerdas of land within the barrio of Loiza village, having thereon two dwelling houses and the various buildings composing a sugar factory, and was described at that time as bounded as follows: On the north, by the settlement called Las Cuevas and the farms of the Madiania belonging to various owners; on the south, by the lands of Ricardo Gallargo, of Pablo Ubarri and of Antonio Garcia Revolledo; on the east by the lands of Cecilio Lopez and of said Pablo Ubarri; and on the west, by the Rio Garnde de Loiza and other lands of the same Gallardo.

Intervenors further allege that thereafter, about the year 186- the said Ramon Ruiz Gandia, being unable to pay his debts, was declared a bankrupt, and afterwards, upon a settlement of the bankrupt estate, the above mentioned Ricardo Gallardo, one of the co-owners in said plantation with said Gandia, acquired title thereto, but subject to various liens in favor of different persons and among them the lien of said Goenaga as herein before set forth; that thereafter said Gallardo obtained from the proper court a possessory title as owner of said plantation and, upon applying for the registry of said title in the year 1882, said registry was made subject to all such liens as appeared against said plantation upon the books of the old registry, which both in applying for said possessory title and for the registration thereof he recognized as valid liens and agreed to pay, and among which was the lien hereinbefore described; and that the validity and existence of said indebtedness and its lien upon said
16 plantation as duly noted in said old registry and recognized by said Gallardo appears in the books of the new Registry in Book 2 of Loiza, folio 2, estate No. 48, first inscription.

Intervenors further allege that neither the principal sum of the indebtedness hereinbefore described, nor any part thereof, nor any interest thereon, was ever paid to José Rufino de Goenaga in his lifetime nor to anyone in representation of him after his death, but that the whole amount thereof still remains due and unpaid, and, with its interest, constitutes a mortgage lien in accordance with the laws of that time upon the said plantation San Jose de Cacique as above described; and that said Notarial instrument marked "Exhibit B" and containing the conclusive proof of the continued existence of said indebtedness and lien was duly presented in, and noted on the books of, the present Registry on the 25th day of April, 1906, as appears upon the face of said Exhibit; but your intervenors admit that their lien upon said plantation for the payment of the indebtedness herein claimed is inferior in dignity and preference to whatever lieu may be decreed upon the same in favor of the complainants in the original bill in the above entitled suit.

Intervenors further represent that the said José Rufino de Goenaga died intestate, leaving as his heirs at law six children, of whom only two survive, to wit: Intervenors Francisco de Goenaga and Ana de Goenaga; that a third child was named José Rufino de Goenaga y Olsá, who died and left as his heirs the intervenors Francisco Goenaga y Fuertes and Rufino Goenaga y Fuertes; that a fourth child was named Rosaria de Goenaga y Olsá, who married Felix Padial and died leaving as heirs her children, the intervenors Felix Padial y

Goenaga and Maria Padial y Goenaga; that a fifth child was named Dolores de Goenaga y Olsá, who married Hereberto Garcia
17 de Quevedo and died leaving as her heirs her children, the intervenors Agusto, Nicolas, Rufino and Carlos Garcia de Quevedo y Goenaga; and that the sixth child was named Obdulia de Goenaga y Olsá, who married Agusto des Cottes and died leaving as her heirs her children, the intervenors Victoria des Cottes and Obdulia des Cottes (y Goenaga).

Intervenors further allege that the said Ricardo Gallardo at his death left two children, the defendant Eliza Gallardo y Seary and Felix Gallardo y Seary, deceased; that at the death of the latter he left as his heirs a widow, the defendant Estefanía Varonni, and two children, the defendants Celestina and Eva Gallardo y Varonni; and that said defendants to this intervention are now in possession and enjoyment of said plantation above named, claiming to be the joint owners thereof.

Intervenors further allege that in the year 1883 and during the lifetime of said Ricardo Gallardo the latter executed a further Notarial instrument wherein he recognized the validity of the indebtedness hereinbefore described as due to the ancestor of your intervenors, and of the lien thereof upon the said plantation; and that by said repeated recognitions of the same the running of the statute of limitations or prescription has been interrupted, and therefore said indebtedness and the right of intervenors to foreclose their lien therefor upon said plantation San Jose de Cacique aforesaid is a valid and subsisting right, of which your intervenors may, and do hereby, avail themselves in this court of equity where matters of that character are peculiarly cognizable.

Forasmuch, therefore, as your intervenors can have no adequate relief except in this court of equity, and to the end that the above named defendants, Elisa Gallardo y Seary, Estefania Varonni, Celestina Gallardo y Varonni and Eva Gallardo y Varonni, may, if they can, show why your intervenors are not entitled to the relief hereby prayed and may be required to enter their appearance and
18 make answer to this bill of intervention—though not under oath—the answer under oath being hereby expressly waived—; that the amount now due to your intervenors, as heirs of said José Rufino de Goenaga, for principal and interest upon the indebtedness set forth and determined in said document marked "Exhibit B" may be fixed and decreed by or under the authority of this honorable court; that the amount thereof, when so fixed, may be decreed to be a lien upon said plantation San Jose de Cacique and foreclosed as such in this suit—but subject and inferior to whatever lien may be decreed in favor of said principal complainants therein; that, in default of the payment to intervenors of whatever amount may be so decreed to be due, within a short day to be fixed by the court, said plantation may be decreed to be sold at public auction to satisfy the same; that, in case of such sale, the defendants herein and all persons claiming through or under them since the annotation of your intervenors' claim in the present Registry of Property may be barred and foreclosed of all right and equity of redemption in said

premises; and that, upon any issues which may be joined upon the answers hereto, a decree may be entered decreeing to your intervenors such relief thereupon as it may be meet and equitable that they should have.

And your intervenors will ever pray.

R. H. TODD,
N. B. K. PETTINGILL,
Solicitors for Intervenors.

19 *Journal Entry.*

TUESDAY, *April* 7, 1908.

No. 524. In Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELISA GALLARDO et al.

Comes now N. B. K. Pettingill, Esq., solicitor for the plaintiffs herein and requests permission of the Court to file a petition for leave to intervene. Said request is granted by the Court, counsel for the parties all being present and not objecting.

Opposition to Plea of Intervention.

(Filed April 11th, 1908.)

JOSEFA RUIZ DE NOBLE et al., Plaintiffs,
vs.
ELISA GALLARDO Y SEARY et al., Defendants.

Come the defendants herein by their solicitor, Henry F. Hord, and opposing the motion for leave to intervene herein filed by Francisco Goenaga y Olsa, Ana Goenaga y Olsa and her husband Agusto Chabert, Francisco Goenaga y Fuertes, Rufino Goenaga y Fuertes, Felix Padial y Goenaga, Maria Padial y Goenaga and her husband, A. Salomon, Agusto Garcia de Quevedo y Goenaga, Nicolas Garcia de Quevedo y Goenaga, Rufino Garcia de Quevedo y Goenaga, Carlos Garcia de Quevedo y Goenaga, Obdulia des Cottes y Goenaga, Victoria des Cottes y Goenaga and her husband Aureliano Ferrer, and say:

That as shown by the records of this court in the foreclosure proceedings pending herein by the said parties against the defendants, on the chancery side of this court, each and all of the said persons seeking to intervene herein are citizens of Porto Rico.

That each and all of the defendants herein are also citizens
20 of Porto Rico.

That nothing contained in the said plea of intervention proposed to be filed herein shows it to be ancillary to the complaint

filed by Josefa Ruiz de Noble et al. against these defendants, but to the contrary the mortgage lien sought to be foreclosed herein in said plea of intervention is a separate and distinct lien to the one sought to be foreclosed by the said Josefa Ruiz de Noble et al.

Wherefore these defendants allege that there is not as between the said proposed intervenors and these defendants the requisite diversity of citizenship to give this court jurisdiction of this cause; that the jurisdiction of this court in this case, if it exists at all, must be based upon the adverse citizenship of the parties hereto, and that the claims of the said proposed intervenors are not ancillary to the rights set out in the said proceeding by the said Josefa Ruiz de Noble et al. against these defendants and that for the foregoing reasons the said motion to be allowed to intervene should be denied.

HENRY F. HORD,
Solicitor for Defendants.

San Juan, Porto Rico, April 11, 1908.

Journal Entry.

DECEMBER 29, 1908.

524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELISA GALLARDO et al.

And now on this day the Court announces from the bench that it will not pass at this time upon the plea in opposition to the intervention herein, because if such plea should be sustained and
21 thereafter the plea to the main cause also sustained, the whole case would be stricken from the docket; and therefore it is announced that the issue in the main cause must first be heard, and counsel are given leave to call the same up at some convenient time for hearing.

Journal Entry.

MAY 5, 1909.

524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELISA GALLARDO et al.

This cause is this day heard on the issue raised by the plea or demurrer in the premises, Messrs. N. B. K. Pettingill and Robert H. Todd appearing for the complainants and Messrs. H. F. Hord and Joseph Anderson, Jr., for the respondents. And the Court hears said counsel for the respective sides, but not being fully advised, requires that each side forthwith file memorandum briefs, and in the mean time takes the issue under advisement.

Opinion.

(Filed July 6, 1909.)

No. 509. Equity.

SUCCESSION OF JOSE RUFINO DE GOENAGA
v.
SUCCESSION OF RICARDO GALLARDO,

and

No. 524.

SUCCESSION OF WILLIAM NOBLE,
v.
SUCCESSION OF RICARDO GALLARDO,

The above two suits are bills in equity for the enforcement of so-called mortgages or "refaccion" contracts or liens on identical
22 land, which is situated near Loiza on this Island. The issue is on a motion by complainants in suit No. 509, for leave to intervene in *in* suit No. 524, and the issue in the latter suit is raised by a plea of laches, staleness of demand and that the cause is barred by several statutes of limitation. In the argument on these issues the cases were heard together, and as the conclusion we have arrived at warrants it, we will consider and dispose of them together.

The bill in No. 509, was filed on October 22nd, 1907, and in 524 about two and a half months later on January 9, 1908. On December 3rd, 1907 respondents in suit No. 509, filed a plea alleging the Porto Rican citizenship of all the parties and hence claiming that the Court was without jurisdiction. A reading of the whole bill would indicate that this fact is probably true notwithstanding a contrary allegation in the stating part of it. It would also appear as though complainants knew the plea was in fact true, because without joining issue thereon, their counsel under date of April 7th, 1908 appears to have entirely abandoned the case, and on that day filed a motion asking leave for all the complainants therein to intervene as complainants in suit No. 524, and accompanied his motion with an exact copy of the bill of complaint that he had filed in suit No. 509.

In suit No. 524, under date of March 3rd, 1908, respondents pleaded gross laches, inexcusable delay and several statutes of limitation, and under date of April 11, 1908, after the petition for leave to intervene had been filed, they came in and opposed the granting of such leave because as alleged the parties thus asking it, were all Porto Ricans as appeared from the facts set out by them as complainants in the bill in suit No. 509, and that so being Porto Ricans they could not intervene in suit No. 524, as all of the respond-
23 ents in that suit were also Porto Ricans, and thus there would be Porto Ricans on both sides of the case, which would oust

the jurisdiction under our decision in the Vallecillo-Bertran case No. 2 P. R. Fed. 46.

To this contention counsel for the intending intervenors replied that the intervention not being an original suit, but ancillary and dependent, that is supplementary merely to the original bill, it could be maintained without reference to the citizenship of the parties, under the ruling of the Supreme Court of the United States in Freeman v. Howe, 24 How. 450, and Krippendorf v. Hyde, 110 U. S. 276, and Killian et al. v. Ebbinghaus id. 568.

We have read both of the original bills, as well as the intervening petition with care, and have also read the exhibits filed as a basis for the right of action in each of the cases. It appears that as long ago as 1862 to 1865, that is about forty five or more years ago, there lived in the Northeast corner of the island of Porto Rico, at or near the town of Loiza, a man named Ramon Ruiz Gandia, who was in possession of a considerable estate called "San Jose Cacique," and that the ancestors of both sets of complainants in these suits furnished him means to plant and gather his crops, particularly sugar cane to be manufactured at a mill he possessed. That José Rufino de Goenaga, the ancestor of complainants in suit No. 509, was the one that furnished money to him in 1862, and the following year, and William Noble the ancestor of complainants in suit No. 524, furnished him money in 1865.

It is alleged that he did not pay off these debts, although public instruments were drawn up in each case to secure them on the crops of those years. It is possible even that one of the instruments is so worded as that it might be held to be a mortgage upon the lands also, but this is not certain. These instruments were duly recorded in the old Anotaduria of that period. However, Gandia, as it is alleged, remained owing Noble $8093, and Goenaga $6063.35. It is also alleged that some time thereafter, the year not being fixed, save that it was in the sixties, this man Gandia, became and was declared a bankrupt, and that after the bankruptcy proceeding was settled, one Ricardo Gallardo, the ancestor of the respondents in both of these suits, (Who was Gandia's partner in the plantation) acquired title to the same, but subject to the liens of Noble and Goenaga as aforesaid.

24

It is further alleged that Gallardo in the year 1882, obtained from the proper court an "expediente posesorio," to the whole of this plantation, but that when the court granted it to him, it required him to recognize these liens as valid, and to agree to pay them.

It is further alleged that respondents in both of these present suits are the heirs of said Gallardo, and that they are still in possession of the property. It is also stated that a year later, in 1883, Gallardo executed a further notarial instrument by which he recognized the validity of this indebtedness, and the liens thereunder upon said plantation, but such exhibit was not filed with the bills.

The record of these alleged liens and presumably these alleged acknowledgments of them, was thus left in the old registry, and not transferred to the new Registry until April 1906, or but a short time

before the filing of these suits, and the transfer was thus made, probably only to give the complainants the right to file the suits.

The effort here is to have these liens established judicially and the amount of each ascertained with interest and costs, and to obtain decrees against the Gallardo heirs and against the land in question therefor; and if the same are not paid, to cause said plantation to be sold to satisfy the debts respectively. The debts if valid would now with interest amount to quite large sums, but the view we
25 take of the matter renders it unnecessary to do any calculating in that regard.

The briefs on both sides are quite able, and are no doubt the result of a considerable search in the law as to laches generally, and the different statutes of limitation known to Spanish law, both under the old and new code. We do not however, think it necessary to determine what particular statute of limitation applies, or whether it is the five year, the ten year, the twenty year or the thirty year statute, if either, that has barred the claims, or whether the running of either one or more of these statutes has been interrupted by the so-called acknowledgment of the debts said to have been made in the years 1882-3.

After examining the instruments given in the first instance in 1862, 1864 and 1865, we have grave doubts whether they could in any event be held to apply to anything save the crops.

It is our opinion that it would be hard to find a case showing such gross and apparently inexcusable laches in the collection of debts, or in the assertion of liens against property as is exhibited in these two cases. Both of the men, Noble and Goenaga, presumably lived in the community here, for several years after these so-called "refaccion" debts became due, and did nothing to collect them or foreclose these so-called liens! It is not even alleged that they or either of them were present at the time of the obtaining of the "expediente posesorio" regarding the land by Gallardo, and so it may have been the mere formal action of the court itself to make him recognize these liens in 1882. But even this so-called recognition of the debts took place when the alleged debts were already from sixteen to eighteen years overdue.

But this is not all, because it appears that from 1882 to 1898, an additional period of sixteen years, Noble or his heirs, and Goenaga or his heirs, or some of both undoubtedly remained right here in the same community, and did nothing to collect these debts if they were in fact still due!

26 Further than this, the heirs waited thereafter, under American occupation eight years more, until 1906, before they even caused the old record of these alleged liens to be transferred to the new Registry.

Can a grosser case of negligence, or a greater example of lack of diligence be imagined? Yet there is not a single allegation in either of the bills offering the least excuse for it.

Once before we had occasion to point out, that courts of equity lend their aid only to the diligent, and will not relieve any one guilty of gross laches and delay. See Llaneras y Quintana et al. v. La

Compañía Ferrea del Oeste 3 P. R. Fed. 83-4. See also our opinion in case No. 160, Dexter v. Maria de la Cruz Godinez et al. to be printed in 4 P. R. Fed.

Statutes of limitation are not necessarily followed by courts of equity, because there can be laches even within a lengthy statute of limitation. Such laws are made for repose, and not to command courts of equity to grant relief to every person who may ask it within the utmost limit of the longest statute:

"Conscience, good faith and reasonable diligence alone call into action the powers of a court of equity. McNight v. Tyler, 1 How. 161.

"It is an established rule with courts of equity independent of any statute of limitation that they will not entertain stale demands. Humes v. Beale 17 Wallace 336; Patterson v. Hewitt 195, U. S. 309."

We need not cite further authorities. A reading of our opinion and the cases there cited, in the Llaneras case supra, and a reading of the opinion of the Supreme Court of the United States in Patterson v. Hewitt supra, where the subject receives elaborate consideration, will we think, convince any one, that this court ought not to lend its aid to these complainants.

We are not admitting that some or all of the statutes of limitation in force in Porto Rico, since these alleged debts became due, have not in fact barred the claims, because we do not think it is necessary to so hold, we are only showing that independent of any statute the demands are too stale, considering their character to induce
27 a court of equity to permit a recovery thereunder.

As stated complainants make no showing as to why nothing was done in the way of asserting their rights through this nearly half a century of time, and in our opinion it is too late now, when the lands in question have no doubt become valuable sugar plantations under the American Government. To permit such stale demands as these are to be recovered upon, would be to put a premium on gross laches and delay. Any delay such as this is, can rarely if ever be excused and certainly not where most or all of the parties interested were present in the jurisdiction of all the time. It may be said that at times there were many infants involved in these cases, but even so, there were also several adults always in existence who could have asserted their rights and foreclosed the liens and collected the debts if any in fact existed.

It will be seen that the points upon which the decision in these cases turn, is simply that of staleness of demand. Therefore we do not wish to be understood as definitely passing upon the legal effect of a "contrato de refaccion." Indeed a short examination shows us that the word "refaccion" according to Escriche had an entirely different meaning in ancient legal Spanish from what counsel are claiming for it on this Island. However, we will not enlarge upon that subject.

All lawyers understand that the reason for the enactment of statutes of limitation is to secure repose. After the lapse of a long period of time it is much harder to defend against stale demands, witnesses may have died, records may have been lost, and many

other things may have occurred which would destroy what at an earlier date would have been a perfect defense, and hence the policy of the law certainly in equity, is against such recovery save in rare and exceptional cases.

28 A court of equity is a new tribunal in Porto Rico, and in our opinion one of the greatest blessings it can confer is to discountenance unreasonably stale demands, and this even within the local statutes of limitation. It should be slow to lend its aid to complainants who neither show diligence or excuse its absence.

When a country changes its sovereignty, notwithstanding that most of the laws of the former Government usually remain in force, still many new rules, laws and policies inseparable from the new sovereignty come into being and we think that this policy of courts of equity which we are discussing is one of them. Some of the civil laws statutes of limitation, especially regarding real estate are in our opinion unreasonably long as compared with the statutes that obtain in most of the States of the Union, but to shorten them is of course for Congress or the local Assembly and not for the courts. However, as we have shown, Courts of Equity are not necessarily bound by such statutes but have discretion in that regard, and they ought not in our opinion to resolve doubts in favor of claims and demands that should have been settled half a century ago. We do not think it would comport with the purposes of a court of equity to enforce in 1909 what may have been but a mere chattel mortgage or its equivalent in 1862.

Therefore the petition for the right to intervene in suit No. 524, will be denied, and the suit itself will be dismissed; also suit No. 509, will in like manner be dismissed, if the same has not already been done, and orders to that effect will be entered with costs in each case against those asking affirmative relief.

B. S. RODEY, *Judge.*

29 *Journal Entry.*

JULY 6, 1909.

Equity. 509.

F. GOENAGA et al.
vs.
ELIZA GALLARDO et al.

and

Equity. 524.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELISA GALLARDO et al.

The issues in the two above entitled causes being practically identical and each having been heretofore submitted after due argument in that behalf, the Court on this day files an opinion referring to the

two causes and giving its reasons for its action, and in accordance therewith it is:

Ordered that, if the same has not heretofore been done, the said cause No. 509, be, and the same hereby is, dismissed with costs against the complainants, and it is further:

Ordered that the petition of F. Goenaga et al. to intervene in suit No. 524 above be, and the same hereby is, denied with costs against the petitioners, and it is further:

Ordered that said cause No. 524 be, and the same hereby is, dismissed with costs against the complainants.

30 *Petition of Appeal.*

(Filed July 10, 1909.)

No. 524. San Juan.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.; FRAN'CO GOENAGA Y OLSÁ et al., Intervenors.

The complainants in the above entitled cause, Josefa Ruiz de Noble, James R. Noble, William D. Noble, Sara Isabel Noble de McCormack, Arthur H. Noble, Josefa B. Noble and Maria T. Noble, as also the said intervenors therein, Francisco Goenaga y Olsá, Ana de Goenaga y Olsá joined by her husband Agusto Chabert, Francisco Goenaga y Fuertes, Rufino Goenaga y Fuertes, Felix Padial y Goenaga, Maria Padial y Goenaga joined by her husband A. Salomon, Agusto Garcia Garcia de Quevedo y Goenaga, Nicolas Garcia de Quevedo y Goenaga, Rufino Garcia de Quevedo y Goenaga, Carlos Garcia de Quevedo y Goenaga, Obdulia de Cottes y Goenaga, and Victoria des Cottes y Goenaga joined by her husband Aureliano Ferrer, conceiving themselves aggrieved by the order and decree made and entered by this Court in the above entitled cause under date of the 6th day of July, A. D. 1909, wherein and whereby, among other things, it was and is ordered and directed that the bill of complaint, and the petition of intervention be finally dismissed, do hereby appeal from said final order and decree to the Supreme Court of the United States for the reasons to be set forth in an assignment of errors to be filed herein; and they pray that this their petition for their said appeal may be allowed, and that a transcript of the record, proceedings and findings upon which said final decree was based, duly authenticated, may be sent to said Supreme Court of the United States.

Dated at San Juan, Porto Rico, this 8th day of July, 1909.

R. H. TODD,
N. B. K. PETTINGILL,
Solicitors for Complainants and Petitioners, Appellants.

31 *Assignment of Errors.*

(Filed July 10, 1909.)

Equity. No. 524.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.; FRANCISCO GOENAGA Y OLSÁ et al., Intervenors.

Come now the complainants and the intervenors in the above entitled and numbered suit, now appellants, by their counsel, N. B. K. Pettingill and R. H. Todd, and assign the following as the errors committed by the Court below during the progress of said cause:

I.

The court erred in holding that mortgage liens of the character of these described in the bill of complaint and petition of intervention herein could be defeated and barred by the defense of laches in their enforcement, irrespective of the statutes of limitations applicable thereto.

II.

The court erred in denying relief to the complainants as prayed for in their bill on the ground that their right thereto had been barred by laches.

III.

The court erred in denying relief to the intervenors as prayed for in their petition of intervention on the ground that their right thereto had been barred by laches.

IV.

The court erred in dismissing complainants' bill of complaint.

V.

The court erred in dismissing intervenors' petition of intervention.

32 Wherefore appellants pray the Honorable, the Supreme Court of the United States, to examine and correct the errors assigned, and for the reversal of said decree herein.

R. H. TODD,
H. B. K. PETTINGILL,
Counsel for Appellants.

Journal Entry.

JULY 10, 1909.

524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.; FRANC'O GOENAGA Y OLSÁ et al., Intervenors.

The complainants in the above entitled cause, Josefa Ruiz de Noble, James R. Noble, William D. Noble, Sara Isabel Noble de MacCormack, Arthur H. Noble, Josefa B. Noble and Maria T. Noble, as also the said intervenors therein, Francisco Goenaga y Olsá Ana de Goenaga y Olsá joined by her husband Agusto Chabert, Francisco Goenaga y Fuertes, Rufino Goenaga y Fuertes, Felix Padial y Goenaga, Maria Padial y Goenaga joined by her husband A. Salomon, Agusto Garcia de Quevedo y Goenaga, Nicolas Garcia de Quevedo y Goenaga, Rufino Garcia de Quevedo y Goenaga, Carlos Garcia de Quevedo y Goenaga, Obudlia de Cottes y Goenaga, and Victoria des Cottes y Goenaga joined by her husband Aureliano Ferrer, conceiving themselves aggrieved by the order and decree made and entered by this Court in the above entitled cause under date of the 6th day of July, A. D. 1909, wherein and whereby among other things, it was and is ordered and directed that the bill of complaint and the petition of intervention be finally dismissed, do hereby appeal from said final order and decree to the Supreme Court of the United States for the reasons to be set forth in an assignment of errors to be filed herein; and they pray that this their peti-
33 tion for their said appeal may be allowed, and that a transcript of the record, proceedings and findings upon which said final decree was based, duly authenticated, may be sent to said Supreme Court of the United States.

Dated at San Juan, Porto Rico, this 8th day of July, 1909.

R. H. TODD,
N. B. K. PETTINGILL,
Solicitors for Complainants and Petitioners, Appellants.

And the Court having heard Robert H. Todd, of counsel for complainants, as well as Henry F. Hord, counsel for respondents, pro and con as to said application and being fully advised in the premises grants said appeal on the following conditions:

If no cautionary notice shall be filed in the Registry of Property pending the appeal to the Supreme Court of the United States, then a bond for costs only in the sum of Three Hundred Dollars ($300.00) as to each set of complainants shall be required, but in case the right to file such a notice is desired, then in such case a bond in the sum of Ten Thousand Dollars ($10,000) on behalf of the Noble heirs and Eight Thousand Dollars ($8,000) on behalf of the Goenaga heirs shall be filed as a condition precedent, and the filing of the bonds shall determine the election of the parties in that regard.

Journal Entry.

AUGUST 23, 1909.

524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELISA GALLARDO Y SEARY et al.

Complainants and intervenors in the above entitled cause having heretofore presented their petition on appeal, but not having
34 perfected same, because of having thereafter filed a petition for rehearing, the said petition for rehearing thereafter being denied; now come by their solicitors N. B. K. Pettingill and Robert H. Todd and renew their said petition for appeal and present in open court their bond for costs in the penal sum of three hundred dollars ($300), and said solicitors announce that they have no intention to apply to the Court for any order of annotation to the Registrar of Property, but that they may ask the same out of court under the statute. Whereupon the Court grants said appeal and approves said bond and the Clerk is directed to prepare and transmit to the Honorable, the Supreme Court of the United States as soon as may be, after the presentation of a proper præcipe therefor, a duly certified copy of the pleadings and proceedings in the above entitled cause.

Appeal Bond.

(Filed August 23, 1909.)

Equity. No. 524. San Juan.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.; FRANCISCO GOENAGA Y OLSÁ et al., Intervenors.

Know all men by these presents, that we, Robert H. Todd, as attorney for the complainants and intervenors in the above suit, as principal, and Arturo Rodriguez and J. H. Brown, as sureties, are held and firmly bound unto Eliza Gallardo y Seary, Estefanía Varonni, Celestina Gallardo y Varonni and Eva Gallardo y Varonni, defendants in said suit, in the full and just sum of Three Hundred Dollars ($300), for the payment whereof well and truly to be made to said defendants, their heirs, executors, administrators or assigns, we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of August, A. D. 1909.

35 Whereas, lately at a session of said District Court of the United States for Porto Rico in the above entitled and numbered suit, the said complainants and the intervenors therein having

obtained from said court an order allowing an appeal to the Supreme Court of the United States from the final decree therein rendered on the — day of July, 1909, whereby the bill of complaint of the complainants and the petition of intervention of the intervenors were respectively dismissed and the defendants allowed to recover their costs, which appeal has been allowed and entered in open court during a stated Term of the same:

Now the condition of the above obligation is such that, if the said complainants and intervenors in the above entitled and numbered suit shall prosecute their said appeal to effect, and shall answer for all costs that may be awarded against them, or any of them, if they fail to make their plea good, then the above obligation is to be void, otherwise to remain in full force and virtue.

R. H. TODD. [SEAL.]
ARTURO RODRIGUEZ. [SEAL.]
J. H. BROWN. [SEAL.]

UNITED STATES OF AMERICA,
District of Porto Rico:

Arturo Rodriguez and J. H. Brown, being first duly sworn, each for himself deposes and says that he is one of the parties who has signed as surety to the above bond, and that he is worth in visible property within the District subject to levy under execution more than the said penal sum of Two Hundred and Fifty Dollars.

[SEAL.]

ARTURO RODRIGUEZ.
J. H. BROWN.

Sworn to and subscribed before me this 16th day of July, 1909.

JOHN L. GAY, *Clerk*,
By C. A. DAVIDSON, *Deputy*.

Taken and approved by me in open Court at San Juan, this 23rd day of Aug., 1909.

B. S. RODEY, *Judge*.

36 *Præcipe for Record on Appeal.*

(Filed August 26, 1909.)

Equity. No. 524.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

In making up the record upon the appeal to the Supreme Court of the United States, recently allowed from the decree dismissing the above suit, the Clerk of the court will please include the following pleadings and proceedings and no others:

1. Bill of complaint filed on January 9, 1908, with its Exhibit A.
2. Plea to said bill, filed March 3, 1908.
3. Motion, petition and bill of intervention, all filed as one paper on April 7, 1908.
4. Order granting petition and admitting intervention, entered on the same April 7, 1908.
5. Opposition to intervention, filed on April 11, 1908.
6. Journal Entries of December 29, 1908 and May 5, 1909.
7. Judge's Opinion, rendered July 6, 1909, and order and decree entered in accordance therewith.
8. Petition for appeal, filed July 10, 1909.
9. Assignment of errors, filed same day.
10. Journal Entry of July 10, 1909, and of August 23, 1909.
11. Appeal Bond, filed August 23, 1909, with its approval.
12. A copy of this præcipe.

N. B. K. PETTINGILL,
R. H. TODD,
Solicitors for Complainants and Intervenors.

37 In the District Court of the United States for Porto Rico.

No. 524. Equity.

JOSEFA RUIZ DE NOBLE et al., Complainants,
vs.
ELIZA GALLARDO Y SEARY et al., Defendants.

I, John L. Gay, Clerk of the District Court of the United States, in and for the District of Porto Rico, do hereby certify the foregoing thirty-six typewritten pages, numbered from 1 to 36, inclusive, to be a true and correct copy of the record and proceedings in the above-entitled cause as the same remains of record in my office as called for by the præcipe of the appellant- herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this fifth day of October, at San Juan, Porto Rico.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk District Court of the United States for the District of Porto Rico.

Endorsed on cover: File No. 21,864. Porto Rico D. C. U. S. Term No. 147. Josefa Ruiz de Noble, James R. Noble, William D. Noble et al., appellants, vs. Eliza Gallardo y Seary, Estefania Varonni, Celestina Gallardo y Varonni, and Eva Gallardo y Varonni. Filed October 12th, 1909. (21,864).

12

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 147.

JOSEFA RUIZ DE NOBLE ET AL., APPELLANTS,

vs.

ELIZA GALLARDO Y SEARY ET AL., APPELLEES.

BRIEF FOR APPELLANTS.

N. B. K. PETTINGILL,
Counsel for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 147.

JOSEFA RUIZ DE NOBLE ET AL., APPELLANTS,

vs.

ELIZA GALLARDO Y SEARY ET AL., APPELLEES.

BRIEF FOR APPELLANTS.

Statement of Case.

A bill to foreclose a lien in the nature of a mortgage was filed by certain of the appellants against the appellees in the District Court of the United States for Porto Rico, in the month of January, 1908.

The bill alleged that in the year 1865 the then owner of a plantation in the municipality of Loiza, island of Porto Rico, called "San José Cacique," acknowledged himself to be indebted to the ancestor of complainants in the sum of 16,186 escudes ($8,093) for money advanced by the latter for the cultivation and maintenance of that plantation (commonly known there as a "refaccion loan"), for which a formal notarial document was executed recognizing the lien

given by law upon the plantation in general for such debts and expressly mortgaging the future crops from said plantation for its payment. It was further alleged that said notarial instrument was duly recorded in the Registry of Mortgages; that thereafter, in the year 1882, the existence and binding force of said mortgage lien was recognized by one Ricardo Gallardo, the ancestor of appellees, who had meantime become the owner of the property, and that no part of the debt had ever been paid.

It was also alleged that by the above and other acts of recognition the running of the statute of limitations against the mortgage had been interrupted, wherefore said indebtedness still remained a valid and enforceable lien on said plantation and its products, and a foreclosure was prayed. (Printed Record, pp. 1-6.)

The defendants interposed a plea to said bill, setting up certain statutes of limitation of thirty, twenty, and five years, respectively, as bars to the maintenance of the action, and also setting up *gross laches* as a defense; but this plea contained no denial of the averments of the bill regarding the interruption of the running of the statute of limitation (p. 6).

Shortly after the filing of this plea certain other parties, now also appellants (who may be designated as the intervenors), filed a petition of intervention *pro interesse suo*, alleging that they had a similar lien upon the same property under a like notarial document, executed in the year 1864, for the sum of $6,063.35, of which the prescription had also been interrupted in like manner as the other, but they admitted that their lien was subordinate to that held by the original complainants. They prayed for a recognition of their intervention and for the enforcement of their rights by the same decree (pp. 8-12).

To this petition of intervention opposition was made by the appellees on the ground that, as the petitioners were admitted to be citizens of Porto Rico, and as the petition showed

that the intervention was not ancillary in its character, the court had no jurisdiction to entertain it or grant petitioners any relief, because of the absence of the necessary citizenship in the parties (p. 12). Thereafter the court entered an order postponing consideration of the grounds of opposition to the intervention until the issue raised by the plea to the original bill was disposed of (p. 13).

A few months later the questions raised by said plea were argued and submitted, and, after deliberation of a few more months, the court handed down an opinion entitled as though there were still two independent causes (pp. 14-18), in accordance with which a decree was entered denying the petition to intervene and dismissing the original bill (p. 18). The dismissal went upon the ground of laches, and no conclusion was stated upon the contentions over the statutes of limitation, as can be seen from the following short paragraph from the opinion (p. 17):

> "We are not admitting that some or all of the statutes of limitation in force in Porto Rico, since these alleged debts became due, have not in fact barred the claims, because we do not think it is necessary to so hold, we are only showing that independent of any statute the demands are too stale, considering their character, to induce a court of equity to permit a recovery thereunder."

From the decree so entered both complainants and intervenors appealed (p. 21) and presented their appeal bond, which was approved in open court at the same term (p. 23), and thus the appellees were brought before this court. The errors assigned are five in number as follows (p. 20):

> 1. The court erred in holding that mortgage liens of the character of these described in the bill of complaint and petition of intervention herein could be defeated and barred by the defense of laches in their enforcement, irrespective of the statutes of limitation applicable thereto.

2. The court erred in denying relief to the complainants as prayed for in their bill on the ground that their right thereto had been barred by laches.

3. The court erred in denying relief to the intervenors as prayed for in their petition of intervention on the ground that their right thereto had been barred by laches.

4. The court erred in dismissing complainants' bill of complaint.

5. The court erred in dismissing intervenors' petition of intervention.

ARGUMENT.

While the assignment of errors has been separated into five different grounds, in order to allege specifically the prejudice suffered by the complainants and the intervenors, yet as their rights rested upon allegations practically identical except as to names and amounts, there are really but two questions to be discussed, which may be stated in the following form:

First. Can a suit to foreclose a mortgage be held to be barred by "laches" when the limit of time fixed by the applicable statute of limitations has not arrived at the time of beginning suit?

Second. Even if the court erred as to the particular ground upon which its decision was based, should its decree be affirmed because the action was really barred by one of the statutes of limitation properly pleaded?

I.

Laches Not a Defense to a Foreclosure Suit.

That the decree of the court below cannot be supported upon the ground stated in its opinion is too clear to require

much argument. That court ignored the distinction in the application of the defense of laches between suits exclusively equitable in their nature and those involving a legal element as well as an equitable—that is, which are of concurrent jurisdiction. Mr. Story in his exhaustive work states the distinction as follows:

> "The statutes of limitation when they are addressed to courts of equity as well as to courts of law, as they seem to be in all cases of concurrent jurisdiction at law and in equity (as for example in matters of account) to which they directly apply, seem equally obligatory in each court. It has been very justly observed that in such cases courts of equity do not act so much in analogy to the statutes as in obedience to them. * * * If the mortgagor has been in possession of the mortgaged estate for the like space of time (*i. e.,* long enough to bar an entry) without acknowledging the mortgage debt, it will be presumed to be paid. * * * But a defense peculiar to courts of equity is that founded upon the mere lapse of time and the staleness of the claim in cases where *no statute of limitation directly governs* the case." (Italics ours.)
>
> Story's Equity Juris. (13th ed.), sec. 1520.

Substantially the same distinction has been stated by this court, speaking by the late Chief Justice:

> "Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern actions at law. In many other cases they act upon the analogy of cases at law; but even *when there is no such statute governing a case* a defense founded upon the lapse of time and the staleness of the claim is available in equity." (Italics ours.)
>
> Metropolitan N. Bank *vs.* Dispatch Co., 149 U. S., 436, 448.

But where statutes *do exist*, fixing a limitation within which suit may be brought, and the character of the suit

involves a legal claim as well as an equitable remedy—that is, which are of concurrent jurisdiction—courts of equity follow and apply the statutes to the same extent as courts of law. This was recognized in the early days by Chief Justice Marshall:

> "The principle is believed to be universal that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the object it bonds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant. The single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into execution has never been considered as such an act. Take the common case of mortgages. It has never been supposed that a subsequent mortgage could, by obtaining and executing a decree for the sale of the mortgaged property, obtain precedence over a prior mortgage in which all the requisites of the law had been observed. * * * A statutory lien is as binding as a mortgage and has the *same capacity* to hold the land *so long as the statute preserves it in force.* (Italics ours.)
>
> Rankin *vs.* Scott, 12 Wheat., 177.

In a more recent case the Federal court in Oregon had granted a decree of foreclosure of two mortgages upon real estate there situate, thereby overruling the defense (among others) of "laches on the part of complainant and staleness of his claim." In ruling upon that defense upon appeal this court said:

> "The question of laches and staleness of claim virtually falls within that of the defense of the statute of limitations. So long as the demands secured were not barred by the statute of limitations there could be no laches in prosecuting a suit upon the mortgages to enforce these demands."
>
> Cross *vs.* Allen, 141 U. S., 528.

Since we shall show under the discussion of the second question that in Porto Rico the statute of limitations affects directly the right to foreclose, there being in the mortgage under consideration no separate "demand secured," it is clear that laches as distinguished from the bar of the statute of limitation could not constitute a defense.

Many cases might be cited to the same effect. We content ourselves with the following:

Diefenthaler *vs.* New York, 111 N. Y., 331.
Boone *vs.* Pierpont, 28 N. J. Eq., 7.
Jenkins *vs.* Wilkerson, 113 N. C., 532.
Jordan *vs.* Sayre, 24 Fla., 1.
Syracuse, etc., Co. *vs.* Rome Co., 67 Hun., 153.
Fullwood *vs.* Fullwood, 9 Ch. D., 176.
In re Baker, 20 Ch. D., 230.

II.

Suit Not Barred by Either of the Statutes Pleaded.

As we recognize the principle that decrees will not be reversed on appeal when sustainable upon some proper ground, even though the trial court has specified a ground which cannot be supported, we proceed to consider the merits of the other grounds stated in the plea—that is, the statutes of limitation.

First let us see what statutes were pleaded. Turning to the plea again (p. 6), we find that one reference to the Mortgage Law was left with blanks unfilled, so that we cannot know what provision was intended to be relied upon, and that the references properly specified cover the following articles or sections of the Mortgage Law and of the Civil Code now in force:

> *Mortgage Law.*—Art. 134. A foreclosure shall be prescribed after twenty years, computed from the

time when such action could have been instituted in accordance with the recorded deed.

Civil Code.—SECTION 1864. Real actions with regard to real property prescribe after thirty years. This provision is understood without prejudice to the prescriptions relating to the acquisition of ownership or of property rights by prescription.

SECTION 1865. A mortgage action prescribes after twenty years, and those which are personal and for which no special term of prescription is fixed, after fifteen years.

* * * * * * *

SECTION 1867. Actions to demand the fulfillment of the following obligations prescribe in five years:

1. For the payment of income for support.
2. For the payment of rents, whether derived from rural or from town property.
3. That of any other payments which should have been made annually or in shorter periods.

It will be noted that these statutes respectively correspond to the "thirty, twenty, and five years" mentioned in the latter part of the plea. Let us dispose of them in the inverse order.

Limitation of Five Years.—This contention requires no discussion, because the provision relied upon (clause 3) is so manifestly inapplicable. Moreover, it could not be applied without a glaring inconsistency between this and section 1865, which expressly refers to mortgages.

Limitation of Twenty Years.—We at once admit that this section would be applicable to all mortgages executed subsequent to the date this Code went into effect (1902); and we are prepared further to admit (though it was not pleaded) that, as said section 1865 is an exact reproduction of a section of the Spanish Civil Code, promulgated in 1889 and remaining in force until that of 1902, was enacted, it would

also be applicable to all mortgages executed after the earlier date, *i. e.*, 1889.

But its applicability to mortgages executed before the year 1889 is clearly negatived by the provision of section 1840 of the same Code (Art. 1939 of the Spanish Code of 1889), which reads as follows:

> "SECTION 1840. Prescription, which began to run before the publication of this Code, shall be governed by the prior laws; but if, after this Code became operative, all the time required in the same for prescription has elapsed, it shall be effectual, even if according to said prior laws a longer period of time may be required."

It will doubtless be admitted by opposing counsel that up to the time of the adoption of this Code of 1889 the *Law 63 of Toro,* which became and appears as *Law V, Title VIII, Book* 11, of the "Novísima Recopilación," was the law fixing the limitation for the foreclosure of mortgages, and that such limitation was thirty years. In any event the Supreme Court of Spain has so decided (Jurisprudencia Civil, vol. 85, page 89; vol. 91, page 107), as also the Supreme Court of Porto Rico in the case which we shall refer to hereafter.

As the mortgage which is the basis of the suit was executed in the year 1865 and was to be paid out of the first crops it evidently became due soon thereafter, at least it was recognized as due and its payment promised according to the allegations of the bill in 1882, hence it came within the provision of said section 1840, last quoted, as one where prescription had "begun to run before the publication of" the Code of 1889. Hence, also, as less than twenty years had elapsed between 1889 and the beginning of this suit in 1908 "all the time required in the same for prescription" had not elapsed—and the foreclosure was not barred, at least under this section.

Lastly, turning our attention to the limitation as contained in Art. 134 of the Mortgage Law, which also fixes the

period at twenty years, we think that it also cannot avail the defendants; nor can any other law avail consistently with the provisions of said section 1840, because the Law of Toro was in force at the time the mortgage became collectible—and the law in force at that time is the one that must govern. This is so because of the language of the section of the Civil Code above quoted where it says that where prescription began to run before the publication of the Code, it "shall be governed by *prior laws.*" The "prior laws" there referred to are the laws in force at the time the *prescription began to run.* This has been decided by the Supreme Courts of both Spain and Porto Rico.

The very question was raised in the latter court on an appeal from the refusal of a Registrar of Property to record a title obtained under a peculiar court proceeding known to that law, because he held that a certain statute of limitation had not run as required by the Code, refusing to apply a statute (or rather military order) which had previously governed. But the Supreme Court said:

> "According to section 1840 of the Revised Civil Code, 'prescriptions, which began to run before the publication of this Code, shall be governed by the prior laws,' and the prescription in this case having begun to run on July 28, 1899, when the possession of the estate in question was recorded, that is to say—three years before the publication of the new Civil Code—general order of April 4, 1899, *in force on that date,* should be applied"; etc. (Italics ours.)
>
> Cobián *vs.* The Registrar of Property, 11 P. R. Reports, 88.

The Supreme Court of Spain stated the principle even more precisely in the following words:

> "Fijandose para la prescripción de dicha clase de acciones por la legislación vigente uando el derecho nació" (Juris. Civ., vol. 100, p. 151).
>
> (The limitation for this class of actions being fixed by the laws *in force when the right arose.*)

Therefore, as the prescription began to run against the mortgage involved in this case in the '60's, the period *then* fixed by law governs the rights of the parties so far as the statutes relied upon in the plea are concerned, because the earliest of them had not yet been in force twenty years at the time of the beginning of this suit.

Juris. Civ., vol. 98, p. 652; vol. 101, p. 434.

Limitation of Thirty Years.—As we admit that the limitation of thirty years governs complainants' rights, it is needless to contend over the question whether that limitation is derived from the section of the Code referred to in the plea or from Law 63 of Toro. Our contention as to this limitation simply is that according to the uncontroverted allegations of our bill of complaint recognition had prevented it from becoming a bar.

The allegations of the bill show that, the mortgage having been executed in the year 1865, it was recognized as still subsistent and a promise made to pay it (in common with other liens) in the year 1882; so that upon the face of the bill it had at no time become barred under the thirty-year limitation, the period from its execution to its recognition being 17 years and that from its recognition to the beginning of the suit being 25 years.

We feel confident this court will agree with us that the question of the statute of limitation as raised by this plea was clearly and expressly decided in a case precisely similar in the Supreme Court of Porto Rico on the 17th day of February, 1908, reported in — P. R. Reports, —, for which reason we have attached the opinion of the court in that case at the end of this brief as an exhibit, and ask its careful examination by this court. Upon the strength of that decision, if upon no other ground the present decree should be reversed.

III.

If the court below erred in sustaining the plea and dismissing the original bill, it also erred in denying the petition of intervention; for the allegations of that petition set forth a case practically identical with that alleged in the main bill, and the circumstances made petitioners' situation one proper for an intervention in the main suit under all the authorities. The want of the necessary citizenship to come in independently, instead of destroying the right of intervention, reinforced it because the *res* was theoretically *in custodia legis* and petitioners could enforce their rights in no other way.

Farmers L. & T. Co. *vs.* Lake St. Co., 177 U. S., 51.
Central Bank *vs.* Stevens, 169 U. S., 432.
Hollins *vs.* Briarfield Co., 150 U. S., 371.
Krippendorf *vs.* Hyde, 110 U. S., 276.

IV.

In any possible view of the case, we submit that the court below erred, and its decree should be reversed.

Respectfully submitted,

N. B. K. PETTINGILL,
Counsel for Appellants.

EXHIBIT A.

IN THE SUPREME COURT OF PORTO RICO.

No. 145.

SUCCESSION OF GONZALO FIRPO and SUAREZ, *Plaintiffs and Appellants,*

vs.

SUCCESSION OF FRANCISCO ANTONIO PINO and Other, *Defendants and Appellees.*

Appeal from the District Court of Aguadilla.

Collection of Mortgage Credit.

Opinion of the Court, Rendered by Mr. Justice Wolf.

SAN JUAN, PORTO RICO, 17*th February*, 1908.

It appears from the record in this case that by a public deed numbered 137, executed in the city of Aguadilla on the 16th day of August, 1875, before the notary, Don Juan Arroyo y Budia, inscribed in the ancient Anotaduría de Hipotecas, now superseded, and from there transferred to the modern books of the registrar of property, Don Francisco Antonio Pino and Da. Cristina Corchado, acknowledged and confessed that they owed to the firm of Koppisch Firpo and Company, then engaged in the trade in that city, the sum of six thousand nine hundred and ten pesos and ninety-five cents, according to the calculation, which runs up to the thirteenth of June, 1877, the whole arising from amounts which the creditor firm supplied said debtors for the cultivation of a sugar and coffee plantation named "Ranchera," which they possessed in the ward of Arenales Altos, in the municipality of Isabela, and said debtors bound themselves

to pay the aforementioned amount in two instalments, one of three thousand two hundred and two pesos and seventy-five cents, on June 30, 1876, and the other three thousand seven hundred and eight pesos and twenty centavos on June 30, 1877. This property, composed of five hundred and fifty cuerdas, was mortgaged by debtors to said firm to secure the debt. Of this property some three hundred and thirty cuerdas came into the possession of Da. Antonia and Da. Maria Pino y Corchado, the respondent in this case. The creditor firm was subsequently dissolved, and by alienation and descent the credits came into the possession of the appellants in this case. The debtors applied on account of the debt the sum of one thousand one hundred and seventy-seven pesos, leaving the same reduced to the sum of five thousand seven hundred and thirty-three, which is the amount which was claimed in the petition and which was payable in gold and silver Spanish money. A summary proceeding under the mortgage was begun before the District Court of Aguadilla, and the court denied the adjudication and sale, and the grounds of the refusal were as follows:

> "1st. Because it is sought to foreclose a mortgage executed on the 16th day of August, 1875, to be paid in two instalments, one of three thousand two hundred and two dollars and seventy-five cents on June 30th, 1876, and for three thousand seven hundred and eight dollars on the same day and month of the following year, and even considering applicable the doctrine that the mortgage real action prescribes within thirty years, it may not be said that the debt is 'exigible' or 'subsistent,' especially the instalment of June 30th, 1876.
>
> "2d. Because the mortgage action by section 142 of the old Mortgage Law promulgated in Porto Rico in 1880, a section which corresponds to 134 to the existing law prescribes in twenty years so far as the same may be exercised with respect to a title inscribed and as the Mortgage Law began in May, 1880, it is evident that a greater period than twenty years has elapsed.

"3d. Because if the sixty-third law of Toro be invoked which required the lapse of thirty years, that law cannot be applied to the special proceeding for the recovery of a credit. This is the opinion held by Galindo de Vera y Ezcozura y Escozura in the fourth volume of the old edition of 1884, published by Felipe V, Madrid, in their commentaries on the Mortgage Legislation of Spain and Ultramar, where on page 231 they write:

> " 'Likewise the executive action to claim the payment of the principal and interest lasts for the thirty years which have been assigned for the time when the mortgage should be considered as prescribed. To our way of thinking, this precept has not modified or reformed Law V, Title VIII, Book XI, of the Novisima Recopilacion, which establishes that the right being the executory action for the personal obligation prescribes in ten years.'

"4th. Because although No. 3 of article 175, paragraph 7, of the Modern Mortgage Law grants this proceeding to the creditors it is clear that it arises only in the case when the title united all the conditions required in article 128 of the law and 168 and 169 of the rules, and I understand that the title presented does not unite the required conditions to authorize the writ of execution, be it that the subsistence and exigibility of all the credits cannot be accepted, be it also on account of other defects that may not pass unnoticed.

"5th. Because the law for the recovery of a mortgage credit by way of a summary proceeding not only required the maturity of the instalment, but also its reduction to a liquidated sum and this reduction is not apparent after the distinct changes of money we have had and when the Firpo Succession maintains the payment of the credit by substituting American money for Spanish without regard to the contract executed.

"6th. Because the transfer from the old books to the modern registry of property has been made after the time prescribed by article 317 of the Mortgage Law and now it is sought to prejudice a tenant who

has his title inscribed in the registry of property and in the petition the Firpo Succession does not ask that with such transfer should be understood the order of payment is required by the Mortgage Law.

"7th. Because it is sought to recover legal interest and costs and neither one nor the other may be required by the summary proceeding unless secured by the mortgage."

From this decision denying the adjudication and sale an appeal was taken to this court.

The principal question involved in the first three grounds of the judge is whether the mortgage proceeding has prescribed. In the mortgage instrument the following appears:

"The said property, together with all it has been said to include, is not otherwise encumbered, as is shown by the proper certificate of mortgages presented to me, and I add to the documents of proof of this current protocol, under No. 75; they especially and expressly subject and encumber it to secure the payment of the debt, conferring on creditors ample power and authority, on the termination of the period, if the parties hereto should not have paid the six thousand nine hundred and ten pesos and ninety-five cents, to bring suits to recover out of the said properties the amount of the principal, and costs, etc.

We are of the opinion that the language used indicates that the parties, although the debts fell due at different times, did not intend that any mortgage action or proceeding should be begun until the whole amount secured was due; in other words, until the time for the payment of the second installment had passed. The date of this second installment was June 30, 1877. The present mortgage proceeding was commenced on the 9th of March, 1907. As the mortgage proceeding could not have been begun before the 30th of June, 1877, the period of prescription did not commence to

run before that date and thirty years had not elapsed when the proceeding was begun. Therefore the action has not prescribed if thirty years is the period of prescription.

We come now to a consideration of article 134 of the Mortgage Law. Some question has arisen in our minds whether as that law was promulgated in the year 1880 the whole period of prescription has not run since then despite the provisions of the old Civil Code in section 1939. The doubt is based on the fact that the Mortgage Law is prior to the Civil Code itself. On the other hand the mortgage was executed in 1875, and as the Mortgage Law did not make section 134 applicable to mortgages executed before 1880 we are constrained to hold that such article cannot be held to apply to the contract before us. We might rule otherwise if the action were supposed to apply solely to the summary proceeding under the Mortgage Law. But it applies to all mortgage actions, as does the similar section of the Civil Code promulgated in 1889. We must therefore hold that the action has not prescribed.

With respect to the fourth ground of the opinion of the court below we think that the papers presented to it were sufficiently complete to authorize the commencement of the mortgage proceeding.

With respect to the fifth ground it is evident that to name a certain kind of specie current at the date of the making of the mortgage is to name a liquidated sum. *Certum est quod certum reddi potest.* Moreover, as alleged by the appellant, the court could take judicial notice of the money circulating at that period.

With respect to the legal interest demanded in the complaint, we think that in treating of a mortgage constituted on a date prior to the publication of the Mortgage Law the provisions of this last-named law are not applicable, but that the provisions of the former legislation apply, according to which the mortgage guaranteed the payment of all interest due, whether expressly agreed upon or legal interest in

default of an agreement, the latter to be computed from the date on which the complaint is filed.

There was also a question raised by the court below because of the failure to transfer to the modern books of the registry of property. We do not see how the interests of a tenant are affected by this case, as suggested by the court below, and we are further of opinion that such transfer was rendered unnecessary as between parties by virtue of section 449 of the rules of the Mortgage Law, and also that a transfer may be made after the time prescribed in the second paragraph of section 397 provided third persons' right are not affected.

For the reasons given the order of the District Court must be reversed.

ADOLPH G. WOLF,
Associate Justice.

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